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No. 90-1795

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

CHROMALLOY PHARMACEUTICAL, INC.

Petitioner,

v.

ROBERT J. BOYER, individually and as Executor of the ESTATE OF MARSHA F. BOYER, deceased

Respondent.

Petition For Writ Of Certiorari To The Superior Court Of Pennsylvania

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Due Process Clause permit the forum-related contacts of a predecessor corporation to be attributed to its non-resident successor corporation for the purposes of establishing *in personam* jurisdiction where:

1. the successor derived financial benefit from its predecessor's forum related activity;

2. the cause of action arises from the forum related activity of the predecessor;

3. the liability for the injury caused by the predecessor's forum related activity has been voluntarily assumed by the successor;

4. the successor knew or should have known that the predecessor's injury producing activity occurred in the forum state; and

5. the predecessor and successor knew or should have known of the dangers associated with the forum-related activity.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below are the petitioner Chromalloy Pharmaceutical, Inc. and the respondents Robert J. Boyer, Sherrie Simmers, Robert A. Simmers, Robert S. Simmers (a minor by his parents and natural guardians Sherrie and Robert Simmers), Children's Hospital of Philadelphia, American Cyanamid Company, Tennessee Gas Pipeline Company (formally known as Tenneco, Inc.), Tenneco Resins, Inc., Forrest Pharmaceutical Laboratories, Inc., Chromalloy American Corporation, Eugene B. Spitz, M.D., C. Everett Koop, M.D., Heyden Products Inc., Fellows Medical Manufacturing Company, Inc., Radiology Dept. of Childrens Hospital of Philadelphia, Rovena Spencer, M.D., and Joseph Stokes, Jr., M.D.

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Respondent Robert J. Boyer ("Boyer") respectfully opposes Petitioner's writ of certiorari to review the judgment of the Superior Court of Pennsylvania entered June 12, 1990.

OPINIONS BELOW

The opinion of the Pennsylvania Superior Court is reported at 394 Pa. Super. 464, 576 A.2d 376 (1990) and is reprinted in Petitioner's Appendix ("Pet. App.") at A-1. The order of the Supreme Court of Pennsylvania denying

the petition for allocatur is reprinted at Pet. App. A-29-30. The order of the Pennsylvania Court of Common Pleas denying Petitioner's challenge to jurisdiction and certifying this issue for appeal is reprinted at Pet. App. A-33 and Pet. App. A-35 respectively.

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1257 (1988).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The provisions of the United States Constitution involved are the Due Process Clause of the Fourteenth Amendment, U.S. Const. amend. XIV §1, and are set forth in Petitioner's Brief at p. 2.

The Pennsylvania Statutes involved, 42 Pa. Cons. Stat. Ann. §§5301 and 5322, are set forth at Pet. App. A-37-38 and Pet. App. A-38-41.

STATEMENT OF THE CASE

Respondent, Robert J. Boyer, individually and as Executor of the Estate of Marsha F. Boyer, deceased, filed this wrongful death and survival action against Petitioner Chromalloy Pharmaceutical Inc., among other defendants. The action arises from the 1949 administration of a highly dangerous x-ray contrast medium, Thorotrast, to

his wife, Marsha F. Boyer. Marsha Boyer died on April 26, 1986 from a cancer related illness caused by the 1949 Thorotrast injection.

Respondent hereby adopts the recitation and application of facts set forth in the Pennsylvania Superior Court opinion, *Simmers v. American Cyanamid Co., et al.* Pet. App. at A-1-27. Petitioner inaccurately represents to this Court that the Pennsylvania Superior Court allowed the exercise of personal jurisdiction over it "on the basis of the two determinations" (the possibility of liability and the contacts of Petitioner's product line predecessors); therefore, Respondent raises the following points relevant to the constitutional issue presented.

First, the Pennsylvania Superior Court specifically found that, by the late 1940s, scientific literature warned of the medical risk to humans inherent in the use of Thorotrast, specifically warning of the increased risk of cancer; and, that Petitioner, and Petitioner's product line predecessors knew or should have known of the dangers. Pet. App. at A-2-3, A-19, A-25-26.

Furthermore, the Superior Court found that Petitioner derived financial benefit from its product line predecessor corporation's Thorotrast related commercial activity in the forum state; and, that Petitioner and Petitioner's corporate predecessor, Testagar, had voluntarily assumed the product line liabilities. Pet. App. at A-25, A-19.

Finally, the Superior Court found that the due process analysis relevant to the issue of personal jurisdiction, and the requisite determination of fairness, cannot operate in a vacuum divorced from the law of successor

liability because the result would be absurd under the facts of this case. Pet. App. A-11-16, A-25.

REASONS FOR DENYING WRIT

A writ of certiorari should be denied because the Pennsylvania Superior Court's decision regarding the assertion of personal jurisdiction over a non-resident corporate successor defendant is in accordance with the fundamental requirements of due process as set forth by this Court. A writ of certiorari should be denied, as well, because no conflict among the Federal Circuit Courts of Appeals exists with reference to the issue presented and because of the unique factual posture of this matter.

I. The Pennsylvania Superior Court Decision Allowing the Exercise of Personal Jurisdiction Over Petitioner is in Accordance with the Fundamental Requirements of Due Process as Set Forth by this Court.

Petitioner asks this Court to review the decision below because the Pennsylvania Superior Court did not perform its jurisdictional analysis in a vacuum. Indeed, the Superior Court acknowledged the analytic similarity between substantive liability and personal jurisdiction with reference to successor corporations. The Superior Court did not, as Petitioner suggests, focus *entirely* on the contacts of Petitioner's product line predecessors. Rather, the Superior Court focused upon the due process requirement of fairness to the non-resident corporation, finding certain analogies between the law of jurisdiction and the

law of successor liability useful to determine whether the exercise of personal jurisdictional over a non-resident successor corporation comports with the fundamental requirements of due process. The Superior Court quoted with approval Judge Caleb Wright's opinion in *Fehl v. SWC Corp.*, 433 F.Supp 939, 945 (D. Del. 1977), which states:

> Certain principles of the substantive law with respect to the assumption by successor corporations of products liability are relevant to this jurisdictional question. . . . Common to the scope of both jurisdiction and liability is the fairness of making a corporation which enjoys the benefit of business within the state [i.e. assets of its predecessor derived from business within the state] answerable in that jurisdiction for wrongdoing associated with that business. . . . The rationale of the substantive liability cases . . . is *equally applicable* to the problem of personal jurisdiction.

Pet. App. at A-15. [citations omitted, emphasis in original]

Crucial to the Superior Court's decision was the fact that Petitioner enjoyed the financial benefits of its product line predecessor's presence in the forum, the fact that the liabilities relating to the product were voluntarily assumed, and the fact that Petitioner knew or should have known the possible extent of any liabilities flowing from the product line and where those liabilities may exist. The Superior Court concluded that "the traditional 'notions of fair play and substantial justice' central to the assertion of jurisdiction are in fact furthered by [this] decision". Pet. App. at A-26. The court specifically rejected the wooden approach to jurisdictional inquiry

which Petitioner advances here. "Any other ruling would allow corporations to immunize themselves by formalistically changing their titles". Pet. App. at A-20 *citing, Duris v. Erato Shipping*, 684 F.2d 352, 356 (6th Cir. 1982), *aff'd sub nom., Pallas Shipping Agency Ltd. v. Duris*, 461 U.S. 529 (1983).

The Pennsylvania Superior Court noted that the standards set forth in *Burger King v. Rudzewicz*, 471 U.S. 462, 474 (1985) are satisfied here because Petitioner's conduct and connection with the forum state were such that Petitioner could reasonably anticipate being haled into Court there. Pet. App. at A-25-26. The court's decision thus falls squarely within the reasoning of this Court with reference to the issue of fairness:

> [w]here [defendants] purposely derive benefit from interstate activities it may well be unfair to allow them to escape having to account in other states for consequences that arise proximately from such activities; *the due process clause may not readily be welded as a territorial shield to avoid interstate obligations that have been voluntarily assumed.* And because modern transportation and communications have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity, it usually would not be unfair to subject him to the burdens of litigating in another forum for disputes relating to such activity.

471 U.S. at 473-474 [citations omitted; emphasis supplied].

In each case before this Court where due process issues were raised as a result of the exercise of personal jurisdiction over a non-resident defendant, the benefits derived by the non-resident defendant from the forum

related activity have been analyzed to determine whether the exercise of personal jurisdiction withstands Due Process analysis. *Accord, World-wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 299 (1980) (financial benefit to defendant from attenuated or collateral relation to the forum will not support jurisdiction if benefits do not stem from a constitutionally cognizable contact with the forum); *Burger King*, 471 U.S. at 479-480 (jurisdiction proper where non-resident deliberately reached out and negotiated with Florida corporation for the purchase of a long term franchise and the benefits that would derive from affiliation with a nationwide organization); *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 112-113 (1987) (mere awareness or foreseeability as the basis for the exercise of personal jurisdiction exceeds the limits of Due Process Clause); *Kulko v. Superior Court*, 436 U.S. 84, 95, *reh'g denied* 438 U.S. 908 (1978) (jurisdiction improper where financial benefit to non-resident resulted not from activity in forum state but from child's absence from defendant's home state).

Petitioner's reliance on *Rush v. Savchuk*, 444 U.S. 320 (1980) is misplaced. In *Rush*, no nexus existed between the forum, the injury and the contacts of the defendant. Moreover, the non-resident defendant derived no financial benefit from the forum contact. Here, Petitioner derived financial benefit from the forum related contacts of its product line predecessor and the injury arose from the predecessor's activity in the forum. Thus, the holding of *Rush* is not applicable to the facts of this case. Because the Pennsylvania Superior Court exercised jurisdiction over Petitioner in such a manner as to satisfy the Due

Process Clause, this Court must decline to issue a writ of certiorari to the Pennsylvania Superior Court.

II. The Pennsylvania Superior Court Decision Does Not Conflict With or Create Confusion Among the Decisions of the Federal Courts of Appeals.

Contrary to Petitioner's contention, the Superior Court decision is *consistent* with the decisions of the Federal Courts of Appeals.

In *Williams v. Bowman Livestock Equipment Company*, 927 F.2d 1128 (10th Cir. 1991), the Tenth Circuit Court of Appeals *expressly adopted* the holding of the Pennsylvania Superior Court, finding that a corporation's contacts with a forum may be imputed to its successor if forum law would hold the successor liable for the actions of its predecessor. *Id.* at 1132, *citing, City of Richmond v. Madison Management Group*, 918 F.2d 438, 454 (4th Cir. 1990). The court in *Williams* declined to exercise personal jurisdiction over the non-resident defendant *only* because application of Oklahoma law would not impose successor liability under the facts of that case.

In *City of Richmond v. Madison Management Group, supra*, the United States Court of Appeals for the Fourth Circuit also expressly adopted the Pennsylvania Superior Court's holding and cited the Superior Court for the proposition that *"the great weight of persuasive authority permits imputation of a predecessor's actions upon its successor whenever forum law would hold the successor liable for its predecessor's actions." Id.* at 454 [emphasis supplied]; Pet. App. at A-14.

The court in *City of Richmond* noted that the "the wholesomeness of that rule is apparent on its face. Every corporation who puts out a lousy product like was done here would avoid all consequences of it by just reforming in some other jurisdiction and avoiding any accountability on it." *Id.* at 455.

Similarly, in *Wines v. Lake Havasu Boat Manufacturing, Inc.*, 846 F.2d 40 (8th Cir. 1988), the court found that the "successor" corporation had purchased certain assets from the predecessor but did not assume any liabilities. As stated above, here Petitioner voluntarily assumed liability for the injuries caused by the Thorotrast product line.

Because the Pennsylvania Superior Court's decision does not conflict with the decisions of the Federal Courts of Appeal, Petitioner's Writ of Certiorari should be denied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Superior Court of Pennsylvania should be denied.

Respectfully submitted,

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